

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

76-7459

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,
Plaintiff-Appellee,

-against-

LOUIS COMMARATO, PRESIDENT AND BUSINESS MANAGER OF LOCAL
UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIA-
TION AFL-CIO, JOHN M. VAUGHN, FINANCIAL SECRETARY OF LOCAL
UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIA-
TION, AFL-CIO; FRANCES MAIDA, RECORDING SECRETARY OF LOCAL
UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIA-
TION, AFL-CIO; AND LOCAL UNION NO. 400, SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Defendants.

LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, AFL-CIO,

Defendant-Appellant,

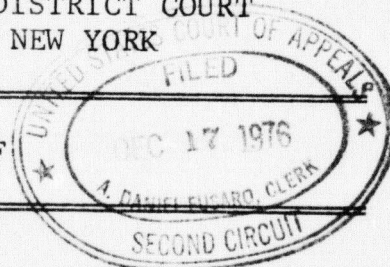
LOUIS COMMARATO, PRESIDENT AND BUSINESS MANAGER OF LOCAL
UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIA-
TION, AFL-CIO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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(5945)

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POINT I

PLAINTIFF-APPELLEES' ARGUMENT THAT
THE ORDER IS NOT APPEALABLE IS
WITHOUT MERIT.

The Courts of Appeal have statutory jurisdiction to review interlocutory orders of the District Court pursuant to 28 U.S.C. 1292 (a) (1). This section of the Judiciary Code provides the exceptions from the usual requirement of finality of judgment. The Supreme Court has said in Baltimore Contractors v. Bodinger, 348 U.S. 176, 181, 75 S.Ct. 249, 252 (1955), these exceptions:

". . . seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence."

Thus, the instant appeal must lie because otherwise substantial rights of the defendant-appellant would be irreparably lost if the order appealed from is not reviewed. Plaintiff-appellee recognizes this and has instituted contempt proceedings based on this order.

The statute must be read in its intended meaning and not be given a strict technical construction as appellee suggests since if the parties must wait to the final disposition of the case to appeal, it will be too late to effectively review the present order. The relief obtained by Appellee in its preliminary injunction would be considerably enlarged if the order cannot be reviewed by this Court. The enlargement of the preliminary injunction in this fashion is contrary to our notions of justice and fair play embodied in the Constitution.

The purpose of a preliminary injunction is to maintain the status quo during the pendency of an action. The preliminary injunction issued by Judge Metzner was issued to accomplish that purpose. (A 12) By its terms it was limited.

It is well settled that an issuing Court has the power to supervise and modify its injunctions in accordance with changed conditions. As the Supreme Court said in System Federation No. 91, Railway Emp. Dept. AFL-CIO v. Wright, 364 U.S. 642, 647, 81 S.Ct. 368, 371 (1961):

"There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." (Emphasis added)

In our case, based upon new conditions and circumstances, Judge Werker by his order modified the preliminary injunction based upon the state of facts presented to the Court at the time of the issuance of the order. This order was a departure from the status quo sought by the preliminary injunction since the order related to trust funds, which are separate and distinct entities from the defendant local union, separate in existence and in administration. Judge Werker's order was the first instance that any dispute over these Funds entered into the litigation.

Plaintiff-appellee insists that the order of Judge Werker was not a modification but rather a construction of Judge Metzner's preliminary injunction. (Appellee's Brief p. 11) The fact that Plaintiff-

appellee did not formally seek a modification does not alter the fact of what was actually done. Since Judge Metzner's injunctive order did not state any obligations or directions with respect to any welfare or pension funds, it would have been improper to adjudicate defendants in civil contempt for failing to comply with the order.^{1/} Therefore, to lay the foundation for perhaps a later contempt application (which has been commenced), the Court agreed with plaintiff-appellee to specifically make an order relating to the Funds. In view of this, modification of Judge Metzner's preliminary injunction is apparent.

In addition, modification is also apparent by the fact that Louis Commarato was specifically directed to comply with Judge Werker's Order, (A 28), despite the fact that he was dismissed as a defendant and was no longer an officer, agent or employee of the Local Union and was not named in Judge Metzner's order (A 12), although plaintiff sought Commarato's inclusion in its own proposed order. (A 14) Clearly, inclusion in an order of a party who had been dismissed as a defendant and not otherwise restrained is not only a modification of preliminary injunction, but is clearly improper and beyond the power of the Court. While an officer, agent or employee of defendant would be bound by an order against the Local Union, Commarato had not been in any of the

^{1/} Plaintiff-appellee states that Louis Commarato refused to comply with the preliminary injunction by failing to turn over documents relating to Local 400 Health, Welfare and Pension Plans (Appellee Brief p.5). It must be pointed out that the preliminary injunction only ordered the turn over of all monies, books and property of Local Union No. 400. (A 15).

aforementioned capacities at the time Judge Werker issued his order. (A 26) It is also apparent in our case that modification rather than construction was the substance of the order appealed from. In SEC v. Investment Corp. of America, 369 F.2d 383 (7th Cir. 1966) cited by Appellee (Appellee's Brief p.16) the defendant who was restrained by an injunction applied for an order construing the preliminary injunction as to whether it would permit it to do certain acts. The order based thereon was held non-appealable and not a refusal to modify an injunction. The Court stated:

"If we were satisfied that modification or refusal of requested modification, rather than construction were the real substance of the matter, we could recognize such substance, disregard form, and exercise jurisdiction." (at 384) (Emphasis added)

It clearly appears from the record that this Court has jurisdiction to determine the merits of the Appeal.

POINT II

JUDGE WERKER'S ORDER MUST BE
VACATED AND SET ASIDE.

Plaintiff-Appellee argues that the order appealed from was proper in view of the need for information of the plaintiff. (Appellee Brief p. 10) Seemingly, Appellee would substitute proceedings in the District Court in place of what is properly discovery proceedings. Plaintiff-Appellee continues to insist that since Mr. Commarato is a "central figure" in the proceeding (Appellee Brief p.15) it can continue to harangue him. Mr. Commarato resigned his position from the Local Union. He was dismissed as a defendant. (A-3) Plaintiff-Appellee apparently believes that the fact his name appears in the caption of this case means he can still be treated as a defendant, even though he was dismissed and is not an officer, agent or employee of the defendant Local. This contention is without merit.

The action below is a proceeding brought to enforce a trusteeship by a large international union against an affiliated Local. There can be no doubt that plaintiff has been granted such preliminary relief in Judge Metzner's counter order (A-12) evidencing the trusteeship.

Judge Werker by his order (A-28) effectively expanded the nature of the proceeding to include issues not properly before the Court in a union trusteeship action. ^{2/}

2/ Encouraged by Judge Werker's view of the proceedings, Plaintiff has moved in the District Court to amend its complaint raising new, and different and unrelated causes of action, against Mr. Commarato, and others. Interestingly, by also seeking to join the benefit funds, Appellee recognizes that the instant proceeding was an improper vehicle for relief it sought.

Plaintiff-Appellee repeatedly urges that since the trusteeship was imposed on the Local Union for alleged financial mismanagement (Appellee's Brief p. 17), that similarly the trusteeship action should reach out to the Welfare and Pension Funds originally established by the Local Union. By this approach it is apparent that the scope of the original proceeding is enlarged. Thus, Judge Werker's order no longer involves the status quo, but expands the Court's order to certain benefit funds which are legally separate entities, not party to the proceeding. ^{3/} To assert that the Funds are mismanaged or illegal is without any factual basis whatsoever. Its assertion that Local 400 has statutory control over the benefit funds is likewise without merit. (Appellee Brief p.22,23) The fact is that Congress intended such benefit funds to be separate distinct entities from a local union. Administration of the funds is separate from the Union and the Trustees of a fund owe a high fiduciary duty to participants. It might even be argued that these fiduciaries have even a higher standard of care to participants than local union officers have to their members.

3/ Plaintiff-Appellee now agrees that these Funds are separate, distinct legal entities from defendant Local Union. (Appellee's Brief p.23) Similarly, its motion to amend the action below, joining the Funds demonstrates its recognition of this basic premise. In addition to the cases cited in our main brief on the independent status of benefit funds see also: Teamsters Local 688 v. Mizerany, --F.S.-- (E.D. Mo. 1974), 92 LRRM 3700.

The Local's Trustee has possession of the documents which were in possession of the defendant Local Union. (A 26,27). These documents clearly define the Local's responsibilities and obligations to the Funds.

It is the Trustees of the Funds who must protect the rights of participants, not the Local Union's Trustee, since the Funds themselves are accountable to participants.

Therefore, Plaintiff-Appellee's argument that it needed the documents to correct practices of the Fund it considered illegal, connects an unrelated matter to the proceedings below. As pointed out, the Funds are not parties to the proceeding and the role of the Local Union in internal affairs of the Funds is limited by law. The Fund can correct any of its own internal problems if such exists.^{4/}

Plaintiff-Appellant urges that the order appealed from was not directed against Louis Commarato individually. (Appellee Brief p.14). However, the order by its terms is directed to "Louis Commarato and other defendants herein" (A-28). This clearly disregards the fact that the only defendant in the proceeding is the defendant local union. Judge Werker was fully apprised of these facts as well as the fact that the Local Union has turned over all of its business records to the Local's Trustee. (A 26,27). Yet the order appealed from was issued.

4/ Plaintiff-Appellee urges there "appears" to be a violation of Section 302(c)(5) of the LMRA. (Appellee Brief p. 21) However, alleged violations of that section like alleged violations of ERISA are not before this Court. Further provisions of that section such as requirements of Joint Administration are not applicable to welfare funds established prior to 1947.

It must be obvious from the papers herein that Plaintiff-Appellee has sought to enlarge and expand its rights under the preliminary injunction. This is hardly maintenance of the status quo. By continuing to proceed against Appellant Commarato, Plaintiff-Appellee is unjustifiably continuing to pursue an individual who was ousted from his position with the plaintiff's affiliated local union.

The action herein is by an International Union against an affiliated local pursuant to its Constitution. It is not a substitute for discovery. Plaintiff-Appellee has obtained a preliminary injunction to maintain the status quo. What it sought and obtained in Judge Werker's order was unjustified expansion of its rights and an improper modification of the preliminary injunction.

CONCLUSION

FOR THE REASONS STATED, THE
ORDER APPEALED FROM MUST BE
VACATED AND SET ASIDE.

Dated: December, 1976

Respectfully submitted,

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Appellant
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New York, New York 10017

[212] 867-9140

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH KAUFSTINE, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 780 CONCOURSE VILLAGE WEST
BRONX, N.Y. 10451.

That on the 17 day of December, 1976,
deponent personally served the within _____

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

Cohen, Weiss & Simon
Attorneys for Plaintiff-Appellee
605 Third Avenue
New York, New York

Sworn to before me this

17 day of December, 1976

Kenneth Kaufstine

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1979